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No. 2406.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

The Atchison, Topeka and Santa
Fe Railway Company, a corpor-
ation,

Plaintiff in Error,
vs.

A. H. Nelson,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

A. H. Nelson brought an action in the Superior Court of the state of California, in and for the county of San Bernardino, to recover damages on account of monies expended for services of doctors and nurses, for the cost of drugs and medicine and hired help, and for the loss of the services of his wife, all growing out of an injury suffered by his wife while a passenger on one of the cars of The Atchison, Topeka and Santa Fe Railway Company in the state of California [Tr. pp. 7 to 13].

On petition of the plaintiff in error the case was removed to the District Court of the United States on the ground of diverse citizenship [15]. Thereafter a supplemental complaint was filed [30] stating that before the commencement of this action Nelson and his wife had sued the same defendant for the injuries to her person suffered by said wife in the same accident, which is referred to in the complaint in the case at bar. The supplemental complaint set out the pleadings and judgment in the former case, and plaintiff declared in paragraph 6 of the supplemental complaint [43] that he set up the judgment roll in the former action as *res adjudicata*, as conclusive upon and as an estoppel in respect to all issues in the case at bar concerning the negligence of the respective parties to the case at bar and the operation and effect of the negligence of either or any of said parties as proximate or producing cause of the injury complained of, and averred that, upon the strength of said judgment the court ought to adjudicate and determine that the defendant was guilty of negligence, and that said negligence was the proximate cause of the injuries complained of; that the plaintiff A. H. Nelson was not guilty of any want of ordinary care or negligence which contributed to the injuries of his wife. There was no claim made by the Railway Company in the case at bar that the plaintiff A. H. Nelson had been guilty of contributory negligence, but it was alleged in the answer [26] that the plaintiff's wife had been guilty of negligence which was the proximate cause of her injuries. Defendant answered the supplemental complaint [48], denying that the judgment roll in the former case was *res*

adjudicata, or conclusive, or an estoppel in respect to any of the issues in the present case.

The case came on for trial on November 13, 1913 [51], and was tried before a jury, which rendered a verdict for \$4,000.00 [50], on which judgment was entered [52]. At the trial the judgment roll, which had been set out in the supplemental complaint, was introduced in evidence, over the objection of the plaintiff in error. That and evidence of the amount of damages was all the case for the plaintiff, and the defendant introduced no evidence [55-6]. The court instructed the jury that the judgment roll was conclusive on the use of due care on the part of the plaintiff's wife, and on the proposition that the negligence of the defendant was the proximate cause of the injury to the plaintiff's wife and to the plaintiff in the case at bar, and that the jury must find for the plaintiff in some sum [56]. The only question in the case on this writ of error is the admissibility and effect as evidence of the judgment roll in the case brought by the plaintiff and his wife.

SPECIFICATION OF ERRORS.

I.

The court erred in admitting in evidence over the objection of the plaintiff in error the judgment roll in the case of A. H. Nelson and Carrie E. Nelson v. The Atchison, Topeka and Santa Fe Railway Company [55]. That judgment roll consisted of a complaint [32] stating that plaintiffs are and were at all of the times mentioned in the complaint husband and wife; that the defendant is and at all of the times mentioned

was a corporation doing business as a common carrier of passengers for hire; that on June 15, 1912, plaintiffs purchased tickets entitling them and each of them to passage from the city of San Bernardino to the city of San Jacinto, paying for such tickets the customary fare; that they boarded the train at San Bernardino as passengers, entered one of the cars, and that upon entering the car and passing down the aisle to a seat plaintiff Carrie E. Nelson violently collided with and fell over a traveling bag which the defendant had negligently placed and allowed to be placed in the aisle, whereby said Carrie E. Nelson was thrown to the floor, stunned, bruised, injured, suffered a broken bone in the right ankle, and the tendons, muscles and ligaments of her right foot, ankle and leg were wrenched, twisted, bruised, sprained and torn away, and that she then and thereby suffered internal injuries and a severe nervous shock, and became and still is sick and sore, permanently injured and disabled, suffered an injury to her right knee joint, bruised, twisted, etc., the muscles, tendons and bones of the right knee, which injury brought about a condition known as water on the knee; that the injuries were caused solely by defendant's negligence; that they resulted from gross, reckless and wanton negligence of the defendant, whereby the plaintiff Carrie E. Nelson has been damaged in the sum of \$50,000.00. The answer [36] denied the negligence; denied that any injuries were caused by the Railway Company's negligence; denied reckless and wanton negligence; denied damages in any sum whatever; and alleged that Carrie E. Nelson's injuries were caused by her own carelessness and negli-

gence. The judgment [39] set forth a verdict of \$1,500.00 and entered judgment thereupon in the same sum and costs "in favor of the plaintiff" in the following language [40]:

"It is considered by the court, that A. H. Nelson and Carrie E. Nelson, plaintiffs herein, have and recover of and from The Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant herein, the sum of fifteen hundred (\$1,500.00) dollars, together with costs and disbursements of said plaintiffs in this behalf taxed at \$54 90/100."

This judgment was entered April 24, 1913 [41].

II.

The court erred in denying defendant's motion for a non-suit at the close of the plaintiffs' case [55], such motion having been made on the ground that the plaintiff had produced no competent evidence of any negligence on the part of the defendant, or of freedom from contributory negligence on the part of Mrs. Carrie E. Nelson, the plaintiff's wife. As stated above, the only evidence of negligence was the judgment roll abstracted in Specification No. 1.

III.

The court erred in refusing to direct a verdict in favor of the defendant [56].

IV.

The court erred in instructing the jury as follows [56]:

"Gentlemen of the jury, you are instructed that the judgment in the case of A. H. Nelson and Carrie E. Nelson, plaintiffs, v. Atchison, Topeka and Santa Fe

Railway Company, a corporation, defendant, No. 217-Civil, in this court, on the 24th day of April, 1913, is conclusive on the use of due care on the part of plaintiff's wife, and that the negligence of the defendant was the proximate cause of the injury to plaintiff's wife and the plaintiff, in the case now on trial, and therefore, you are instructed that your verdict must be in favor of the plaintiff in this case in some amount."

ARGUMENT.

The judgment in the former case has only the same effect as evidence in this case which that judgment would have had, had it been rendered by a court of California.

Both in the case at bar and in the case brought by the plaintiff and his wife the jurisdiction of the federal court rests solely upon the diverse citizenship of the parties.

In *Dupasseur v. Rochereau*, 21 Wall. 130, 22 L. Ed. 588, Mr. Justice Bradley discussed the subject of *res adjudicata* in the federal courts. The case came to the Supreme Court on a writ of error from the Supreme Court of the state of Louisiana, where the defendant had set up a former judgment of a United States Circuit Court. The jurisdiction of the United States Circuit Court in that former case was based solely on the citizenship of the parties, so that the jurisdiction of the United States Circuit Court had been to administer the laws of the state, and Mr. Justice Bradley said that the only effect that could be justly claimed for the judgment in the United States Circuit Court was such as would belong to judgments of the state courts rendered under similar circumstances:

“No higher sancity or effect can be claimed for the judgment of the Circuit Court of the United States rendered in such a case under such circumstances than is due to the judgments of the state courts in a like case and under similar circumstances. If, by the laws of the state, a judgment like that rendered by the Circuit Court would have had a binding effect as against Rochereau, if it had been rendered in a state court, then it should have the same effect, being rendered by the Circuit Court.”

In *Union & Planters Bank v. Memphis*, 189 U. S. 71, 47 L. Ed. 712, the case came up on appeal from the United States Circuit Court, where the jurisdiction of the Circuit Court rested on the ground that the cause arose under the Constitution of the United States. It appeared that it was the settled rule in Tennessee that the plea of *res adjudicata* is only applicable to the taxes actually in litigation, and is not conclusive in respect to taxes assessed for other and subsequent years. The court said:

“It is enough that in Tennessee the doctrine of *res adjudicata* is not applicable to taxes for years other than those under consideration in the particular case, inasmuch as what effect a judgment of a state court shall have as *res adjudicata* is a question of state or local law, and the taxes involved in this suit are taxes for years other than those involved in the prior adjudication. * * *

“As the judgment pleaded had no force or effect in the Tennessee state courts other than as a bar to the identical taxes litigated in the suit, the courts of the United States can accord it no greater efficacy.”

The judgment pleaded in that case was a judgment of the state court of Tennessee.

In *Deposit Bank v. Board etc.*, 191 U. S. 499, 48 L. Ed. 276, Mr. Justice Day discussed the question of *res adjudicata* in a case brought by writ of error from the Court of Appeals of Kentucky, and the court quotes with approval what was said by Mr. Justice Bradley in the Dupasseur case.

Similar rulings have been made with respect to questions somewhat analogous, under section 721 of the Revised Statutes of the United States. Thus, although at common law a federal court has no power to order a physical examination of a plaintiff suing for a personal injury, yet, where there is a state statute authorizing such an order, the federal court must follow the state statute and order the examination.

Camden & S. R. Co. v. Satson, 177 U. S. 172, 44 L. Ed. 721.

So, also, the federal courts follow a state statute prohibiting physicians from testifying as to matters learned by them while treating their patients.

Connecticut Mut. L. Co. v. Union Transfer Co., 112 U. S. 250, 28 L. Ed. 708.

A state statute of fraud is always followed by the federal courts.

Moses v. Bank, 149 U. S. 298, 303, 37 L. Ed. 743.

We submit that state statutes of limitations being statutes of repose are somewhat analogous to the law

of *res adjudicata*. State statutes of limitations are always followed by the federal courts.

Bauserman v. Blunt, 147 U. S. 647, 37 L. Ed. 316;

Metcalf v. Watertown, 153 U. S. 671, 38 L. Ed. 861;

Michigan etc. Bank v. Eldred, 130 U. S. 693, 32 L. Ed. 1080.

Under the law of the state of California judgment in the case brought by the plaintiff and his wife was not res adjudicata, but is res inter alios acta and was not admissible.

Section 1908, Code of Civil Procedure of California, reads as follows:

“The effect of a judgment or final order in an action or special proceeding before a court or judge of this state or of the United States having jurisdiction to pronounce the judgment or order is as follows: * * *

“2. In other cases the judgment or order is in respect to the matter directly adjudged conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding litigating the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding.”

Section 1909 reads as follows:

“Other judicial orders of a court or judge of this state or of the United States create a disputable presumption according to the matter directly determined between the same parties and their representatives and successors in interest by title subsequent to the commencement of the action

or special proceeding litigating for the same thing, under the same title, and in the same capacity.”

Section 1910 reads as follows:

“The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case *and a judgment or other determination could in that case have been made between them alone*, though other parties were joined with both or either.”

The words which we have italicised in section 1910 are perhaps not the law in any state other than California, but they have been contained in the statute law of California ever since 1872. They seem to be an attempt to state the rule as announced in *Bigelow v. Winsor*, 1 Gray 299, by Chief Justice Shaw. The commissioners appointed for the Revision and Reform of the Law of California, in their report made in 1900 with respect to the Code of Civil Procedure, on page 203, recommended that these words be struck out of section 1910, referring to Freeman on Judgments, section 160, where that author, without referring to the California statutes, condemns a somewhat similar statement of the rule of *res adjudicata*. Following this recommendation of the commissioners the legislature passed an act amending the Code of Civil Procedure, one of the amendments being a change of section 1910 in accordance with the recommendation of the commissioners (see Statutes 1900, pp. 244, § 470). But this blanket amendment was held invalid by the Supreme Court of the state because it contained more than one subject.

Lewis v. Dunne, 134 Cal. 291.

Since that time, many of the recommendations of the commissioners have from time to time been adopted, but no change has been made in this section. So it is evident that these words must be reckoned with as language to which particular attention has been called and which the legislature has not yet seen fit to strike out.

No judgment could have been rendered in the case of Nelson and his wife in favor of Nelson alone.

In *Matthew v. C. P. R. R. Co.*, 63 Cal. 450, an action by husband and wife for personal injuries to the wife, the court said:

“The ground of the action is the wife’s personal injuries. The cause of action is hers. The husband was joined as a plaintiff because the common law rule requiring that he do so is yet in force. *But the husband could not himself recover for the personal injuries sustained by the wife.*”

In *Baldwin v. Second Street etc. R. R. Co.*, 77 Cal. 390, an action was brought by the wife without joining the husband, but no objection was made either by demurrer or answer to a defect of parties plaintiff. On the trial the defendant moved for a non-suit on the ground that the plaintiff was a married woman. The court said that the motion was properly denied because the plaintiff was living separate and apart from her husband by reason of his desertion. Furthermore, even if the evidence failed to show desertion, the objection was waived because not raised by demurrer or answer. The court then quote from the case of *Matthew v. C. P. R. R. Co.* to the effect that the husband could not himself recover for personal injuries to the wife and adds:

“The wife in such cases is a necessary party. *No recovery can be had for such damages in an action to which she is not a party.*”

See also:

Gomez v. Scanlon, 155 Cal. 529.

In Williams v. Casebeer, 126 Cal. 77, an action for damages to a married woman on account of an action for malicious prosecution, it was urged that the judgment should have run to the wife only, but the court said that in such a case *verdict and judgment may properly be given in favor of husband and wife jointly.*

See also:

Neale v. Depot Co., 94 Cal. 425, and

Paine v. San Bernardino, 143 Cal. 654.

Although in the foregoing cases it is nowhere expressly stated that no separate judgment in favor of the husband alone may be entered in a suit brought for the wife's injuries in which he is joined as plaintiff; yet the only inference that can be drawn from these opinions is that the judgment must be joint. In other states rulings have been made squarely upon the point.

In Lindsay v. O. S. L. R. Co. (Idaho), 90 Pac. 984, action was brought for wrongful expulsion of the respondent from a passenger train. He, with his wife, who was ill, went to the station to take passage. He had a ticket for himself, boarded the train, and was ordered off. In a supplemental answer there was set up a plea of *res adjudicata*, in support of which there was offered in evidence the judgment roll in the case of Lindsay and his wife, in which a judgment had been

rendered for the defendant. That was an action to recover damages on account of the physical injury and pain and agony suffered by the wife because of the ejection of her husband from the train. It was contended that but one wrongful act was involved, and the damages being community property the plaintiff could not split his cause of action and bring one on account of damages to Mrs. Lindsay and another for his own wrongful expulsion. But the court made the following statement, which is very much in point here:

“It is made necessary by our statute for the husband to join with the wife in an action for damages for personal injuries to herself where the proceeds recovered is community property, and it is conceded that whatever could have been recovered, if anything, in that action (referring to a former action) would have been community. Section 4093, Rev. St. 1887. The wife, under that section, could not sustain her action to recover for personal injuries without joining her husband with her. This action the husband has brought on his own account for injuries sustained by himself, and the wife is not a proper party plaintiff in this action. The other action referred to, which was brought for injury to the wife, *required judgment, if any, to run to both husband and wife*, and in the case at bar the wife is not the necessary party. The wife, if she has a cause of action for personal injuries, must join her husband in the action. The husband, if he has a cause of action, need not join the wife in order to have judgment rendered in his favor. The court did not err in rejecting said judgment roll as the defendant’s *res adjudicata* was not well taken or pleaded.”

Even in New Jersey, where, by statute, in an action by husband and wife for her personal injuries the husband may add a count for his loss of services, it is

held that the verdict must find the damages on the two counts separately and that on the count for the wife's injuries a joint judgment must be entered; on the other count a separate judgment in favor of the husband alone.

Consolidated Tr. Co. v. Whelan, 37 Atl. 1106.

In Meese v. City (Wis.), 4 N. W. 406, the court said:

"It is conceded by counsel for the respective parties that the joint action by the husband and wife to recover damage for the personal injuries to the wife *abated with her death*. Such action abated at common law, and it is not saved to the husband by our statute (citing several cases). It is clear, therefore, that the action brought by the plaintiff and his wife, in which the only damages claimed were damages for personal injuries to the wife, abated absolutely at the death of the wife, *and could not be prosecuted further by the husband.*"

In Fowden v. Pac. Coast S. S. Co., 149 Cal. 151, the court said, in regard to the abatement of an action for personal injuries by the death of the plaintiff:

"It may be conceded that the rule applies to such a cause of action as is stated in the complaint herein, and that no change in the common-law rule material to such a cause of action has been made by statute in this state. See Harker v. Clark, 57 Cal. 245."

In Texas & Pacific v. Watkins, 26 S. W. 760, after the wife had been injured but before suit had been begun, the husband died and the widow brought the action for herself and as next friend of her children.

The court said:

“We are of opinion that the cause of action for the injuries received by the wife, under the circumstances set forth, not having been reduced to judgment during the life of the husband, cannot be said to have been acquired as community property, and that after his death she had the right to maintain it therefor in her own name, for her separate use. In *Nickerson v. Nickerson*, 65 Tex. 284, it is said: ‘There are circumstances in which, by the rules of the common law, the separation of the husband and wife confers on her the right to sue and be sued, and otherwise to act as a *femme sole*. If, therefore, a separation of this sort has taken place, it is plain, in legal reason, that the wife may recover, in an action for a tort, suing alone, both those damages which could be recovered in the name of the husband and wife, and in the sole name of the husband, were they living together. *A fortiori*, if, before action brought, the husband dies, or a divorce intervenes, the woman can recover the whole to her own use. 2 Bish. Mar. Wom. 276. Such a cause of action as is asserted in this case would not survive to a husband on the death of the wife, but, as the injury was personal to the wife, she could prosecute a suit after discoveriture by death or divorce, whether brought before or after that event, unless her right to do so is defeated by the matter which is contained in the second proposition insisted on by the appellant.”

Surely it cannot successfully be maintained that a separate judgment may be entered for the husband in a suit which would not survive the death of the wife, but which would survive his death.

The question must be determined on the law in force at the date of the trial.

The law of *res adjudicata* is treated in the California system of codes as part of the law of evidence. While at the date when the former action of Nelson and his wife was tried the law of California required the joinder of husband and wife as plaintiffs, yet, before the present action was tried, the law had been changed so as expressly to give the wife the right to sue alone for her personal injuries. (Laws of 1913, p. 217, Chap. 130.) This change makes the law of California accord with that of most states of the Union.

That a judgment for the wife in an action brought under the law as it now stands could not be pleaded or used in evidence in a suit by the husband for loss of her services is well settled.

Walker v. City (Pa.), 45 Atl. 657;

Womack v. City (Mo.), 100 S. W. 443.

Now, when section 1910 designates the parties between whom the former judgment may be pleaded, must it not be supposed and interpreted to speak in general terms, and in continuing terms, so as to accord with the rule that admissibility of evidence is to be determined by the state of the law at the date of the trial? And since under the law existing when this case was tried the husband would have been neither a necessary nor a proper party to the wife's action, does it not follow that the judgment was inadmissible in this case?

Upon this precise point we have been unable to find authority and submit it as a proposition of first impression. And we regard the matter as of minor importance in view of the clear application of section 1910 to the situation existing even before the amendment of 1913.

It is respectfully submitted that the judgment ought to be reversed.

Dated September 16th, 1914.

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